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BEFORE THE
STATE WATER RESOURCES CONTROL BOARD
STATE OF CALIFORNIA

10 In the matter of)
11)
12 HEARING ON DRAFT CEASE AND DESIST) SOUTH DELTA AND LAFAYETTE
13 ORDERS 261.31-16 & 261.31-17 REGARDING) RANCH'S CLOSING BRIEF
14 DELTA SALINITY AND WATER QUALITY)
15 RESPONSE PLAN)
16 _____)

17 The SOUTH DELTA WATER AGENCY ("SDWA") and LAFAYETTE RANCH
18 submit the following Closing Brief regarding the above-referenced proposed Cease and Desist
19 Orders.

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I. INTRODUCTION

20 This case comes to the Board as a two-prong effort by DWR and USBR to avoid their
21 water quality obligations contained in their permits to divert and store water. Since the adoption
22 of the Revised D-1641 on March 15, 2000, DWR and USBR have known that their current
23 operations, geared to meet the Vernalis 0.7/1.0 EC standard, would be insufficient to also meet
24 the other three interior South Delta standards¹ when those too were implemented at 0.7/1.0 EC
beginning April 2005.

25 Rather than undertake any actions that would enable them to meet the three interior South
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27 ¹ Brandt Bridge, Old River near Middle River, and Old River at Tracy Road Bridge are
28 three compliance locations for Water Quality Objectives for Agricultural Beneficial Uses in the
South Delta. Herein, they are referred to as the interior South Delta standards, or objectives.

1 Delta standards, DWR and USBR waited until the last minute and then sought to avoid their
2 obligations by delaying and changing the requirements.

3 At some point, the Division of Water Rights (“Division”) embarked upon a joint effort
4 with the projects to accomplish this delay/change as evidenced by each of the two topics of this
5 hearing. In crafting the draft CDO’s, the Division extended the time by which the permanent
6 South Delta operable barriers must be installed and, more tellingly, failed to specify whether the
7 projects must meet the existing permit conditions (0.7 EC in April through August) during the
8 time frame until the barriers are in fact installed.

9 Not coincidentally, the Division at the same time issued a *Water Quality* Response Plan
10 which waived the 0.7 EC standard as a precondition to joint point of diversion operations.
11 Hence, we see that the Division, through two separate processes, acted to frustrate the directives
12 in D-1641 of meeting the water quality objectives and of having such compliance as a
13 precondition to JPOD.

14 One cannot seriously argue that on the one hand the Division meant that the CDO’s
15 required compliance with the 0.7 EC standards while, on the other hand, it clearly excused
16 compliance of those same standards for JPOD operations. Such blatant efforts by the Division
17 should not be tolerated, rather they should be investigated to determine who was involved in the
18 efforts to frustrate the provisions of D-1641 by waiving permit conditions adopted in water right
19 order.

20 As set forth below, the evidence is clear that the 0.7 EC standard at the three interior
21 South Delta compliance locations is at risk, and as such CDO’s should issue.

22 **II. PROPOSED CEASE AND DESIST ORDERS**

23 The Hearing on the CDO’s asked two questions: (1) Should an order issue, and (2) what
24 conditions should the order contain? The first question begins with an evaluation of whether a
25 violation of the standards, and therefore permit conditions are likely.

26 **A. Is There a Threatened Violation of the Three Interior South Delta Water Quality 27 Objectives/Permit Conditions?**

28 In the February 14, 2005, letter from DWR and USBR to the SWRCB accompanying

1 their Petitions to Change (DWR-18b Attachment 2 see pages 7-8) these same permit conditions,
2 the projects acknowledged that exceedances of the three South Delta standards were likely.
3 [DWR attempts to distinguish between exceedances and violations, arguing that if an exceedance
4 is not “caused” by the operation of their facilities, then it is not a violation of their permit
5 conditions to meet the standard. This issue will be dealt with below.]

6 Further, DWR’s witness John Leahigh states in his testimony:

7 As discussed during the previous testimony on the adoption of the CDO, it is
8 likely that the 0.7 EC objective will be exceeded under certain conditions until
9 installation of the permanent gates.

10 (DWR-24 at page 2.)

11 DWR’s witness Jerry Johns confirmed that DWR was not undertaking any additional
12 actions, which, when combined with their current operations, would allow them to meet the 0.7
13 EC standard (as opposed to the 1.0 EC standard).

14 Q. What additional actions has DWR undertaken in anticipation of the 0.7
15 becoming effective in April 2005?

16 A. We can’t think of any – the panel – Mark, have you got anything you can
17 think of?

18 (November 18, 2005, transcript, 23:22-25.)

19 Q. And in the interim between the time the standards became effective and the permit
20 [sic.] barrier program was operating, what additional actions did you anticipate taking in
21 order to try to meet the standards?

22 A. There are very few options available to us as a permittee.

23 (November 18, 2005, transcript, 25:21-26:1.)

24 The Bureau did not deign to participate in the CDO hearing against itself, and did not offer any
25 information on what actions it might take to meet the 0.7 EC standard. Curiously, DWR feigned
26 ignorance as to USBR’s operations aimed at meeting their joint water quality responsibilities.

27 Q. And at this time their interim operations plan, which is their blue print for
28 operating New Melones, is only geared towards meeting Vernalis and not towards
meeting Brandt Bridge. Is that correct?

A. I’m not sure I know that for sure.

(November 18, 2005, transcript, 13:23 - 14:1.)

SDWA and LAFAYETTE RANCH did clarify that USBR operations use only New

1 Melones releases to meet the Vernalis standard, and that such releases are not made to meet any
2 of the three interior South Delta standards.

3 The testimony of the Division's witness, Mr. Lindsay, also showed that violations were
4 likely (see WR-2, and October 24, 2005, transcript 43:18 - 46:21).

5 From the above, the Board must conclude that DWR and USBR's current operations are
6 geared towards meeting a 0.7 EC at Vernalis and a 1.0 EC at the three interior South Delta
7 stations from April through August. DWR and USBR are not undertaking any additional actions
8 to meet the new 0.7 EC (April through August) standard at the three interior South Delta
9 stations, and therefore a violation of the 0.7 EC standard is likely at those three stations absent
10 some fortuitous hydrological events.

11 **B. If There is a Threatened Permit Violation, is There any Reason to not Enforce the**
12 **Permit Terms?**

13 1. Harm to Agricultural Beneficial Uses is Likely. Initially, it must be recognized
14 that the water quality standards here are Water Quality Objectives for Agricultural Beneficial
15 Uses. Hence, by definition, they are necessary for the protection of agricultural beneficial uses
16 in the South Delta. Because DWR and others disputed the necessity of enforcing water quality
17 objectives, CDWA and SDWA et al. presented evidence of how the standards are necessary to
18 protect Delta agriculture.

19 a) CDWA witness Rudy Mussi gave extensive and comprehensive testimony
20 and evidence of how his Delta farming is effected by irrigation water salinities, and the efforts he
21 under takes to manage and control those effects. (See CDWA 9A, 9A, and 9C. See also October
22 25 transcript 32:7-33:2 and pages 53 et seq.) From this testimony and others, it was clear that
23 allowing increases in salinities (1.0 EC instead of 0.7 EC) causes harm to Delta farmers; more
24 salt equals more harm.

25 b) In addition, SDWA et al. presented the testimony of Alexander
26 Hildebrand and William Salmon (SDWA-2 and Attachments A-J and SDWA-3 and Attachments
27 A-E). Again, this testimony clearly showed that salinities above the standard have been, are
28 now, and will continue to harm Delta agriculture. Mr. Salmon's testimony was particularly

1 informative. He explained that he is and has been experiencing salt damage to his various crops
2 including beans, walnuts, and grapes. Mr. Salmon gave detailed estimates of the salt damage to
3 those crops for the year 2002. It was telling that Mr. Salmon's crop damages were occurring at
4 times when the irrigation water salinity in the surrounding Delta channels was above the (now)
5 0.7 EC standard but below the (previous) 1.0 EC standard which DWR alleged to be adequate.

6 c) DWR attempted to contradict this evidence in a number of ways. First,
7 they believed a statement in a report (SDWA-3, Attachment B, page 3) on the chloride toxicity
8 in Mr. Salmon's grapes indicated the problem was due to "deficit irrigation" which is a practice
9 whereby a farmer withholds irrigation water late in the season to increase the sugar production in
10 the grape berry. However, Mr. Salmon clarified that this statement was a general comment by
11 the lab regarding how such a practice might be affecting the crop. Mr. Salmon confirmed that
12 practice is and was not done on his grapes.

13 A. No, I don't -- we don't do any type of water stressing. Most of the guys in
14 Napa, Santa Rosa, probably Lodi. But the Delta Region, we don't opt to do any
of that deficiency irrigation. Our water table doesn't allow for that.

15 (November 17, 2005, transcript, 70:10-14.)

16 Second, DWR asserted that the damage to the grapes was due to a lack of subsurface
17 drainage and/or the existence of an impermeable soil layer which prevented leaching. Again,
18 Mr. Salmon clarified DWR's misunderstanding. His grapes (and walnuts) have tile drainage
19 (subsurface drainage piping). Further, although the "impermeable layer" comment was again a
20 generic response by the lab, he actually did do the recommended test excavations and
21 determined no such impermeable soil layer existed. (November 17, 2005, transcript, 70:19 -
22 71:16.)

23 Third, a DWR witness stated on cross-examination that he "took chemistry classes"
24 (November 18 transcript 149:24-25) and therefore concluded chlorides could not build up in the
25 soils. We need not spend much time with such "evidence." The unsupported speculation of a
26 DWR employee who has never undertaken any investigation of Delta soils, irrigation water
27 qualities, crop biology, or salinity impacts is not reliable evidence to contradict a farmer's lab
28 results showing chloride toxicity. Both Mr. Salmon's direct testimony (SDWA-3 and

1 Attachments) and Mr. Hildebrand's rebuttal testimony (November 18, 2005, transcript 183:16 -
2 184:25) clarify that there is a chloride problem in the South Delta and that chlorides originate
3 from the CVP.

4 The Board should note that there was no rebuttal testimony attempting to disprove Mr.
5 Salmon's damages to beans, grapes and walnuts.

6 d) There were attempts by DWR and other parties to suggest through cross-
7 examination that farmers in the Delta should avoid irrigation at times where there are high
8 salinities in their irrigation supply water, and that they should undertake other measures to avoid
9 harm. Suffice it to say, that besides being unsupported speculation by the parties, the idea that
10 those protected by a water quality objective should expend time and effort so that the objective
11 can be violated is nonsensical.

12 e) SDWA et al. put on additional relevant testimony. Mr. Hildebrand
13 explained how, based on his personal experience and on the studies he has participated in
14 (SDWA-2, November 17, 2005, transcript 16:7 - 21: 11) salinities above 0.7 EC in the April
15 through August period are harmful to crop production. This previous work resulted in the
16 development of the water quality objectives which were based upon the determination of
17 recommended salinities in irrigation water to allow adequate leaching in the variable soil types
18 in the South Delta. (See SDWA-2.) This testimony and the previous studies supporting it were
19 not disputed by the other parties (except by DWR's John Letey which is addressed below). In
20 fact, it was based in part on Mr. Hildebrand's prior testimony and these same studies that the
21 SWRCB adopted and eventually implemented the 0.7 EC standard. An informative explanation
22 of the problem is set forth in the November 18 transcript at pages 192 - 201.

23 f) Mr. Terry Prichard also gave testimony on whether or not the 0.7 EC
24 standard was necessary to protect agricultural crop production. His direct testimony noted that
25 no additional work had been done since the standards were developed that took away from the
26 prior work's accuracy. (SDWA-5.)

27 DWR tried to counter this testimony through Mr. John Letey. His revised testimony
28 addressed a number of issues, generally that 1.0 EC was adequate for Delta agricultural crop

1 production, that rainfall helped leach soils of salts, and that Mr. Salmon's testimony must be
2 incorrect.

3 However, in SDWA's rebuttal case, Mr. Prichard addressed and refuted Mr. Letey's
4 various assertions. Mr. Prichard noted that in order to arrive at the conclusion that 1.0 EC was
5 adequate, Mr. Letey assumed a soil permeability that allowed adequate leaching. Hence, he
6 simply chose a favorable condition in order to reach his conclusion.

7 Q. Mr. Prichard, let me just clarify then. Are you saying that the assumptions
8 that Mr. Letey used in order to determine that crop damage would not occur at 0.7
9 relied upon, in part at least, on an assumption dealing with sandy soils rather than
10 the soil types in the South Delta?

11 A. That's correct.

12 (November 21, 2005, transcript, 4:6-11.)

13 Second, Mr. Prichard noted that contrary to the existing guidelines, Mr. Letey assumed
14 different levels of the root zone take in water at different rates. Mr. Prichard stated:

15 But, in fact, if one does that and looks at the soil salinity profile as extracted, one
16 sees there's no change in concentration from the top to the bottom of the profile,
17 which is obviously not the case. So given this untested and unjustifiable method,
18 one can come up with again about a 2.33.

19 The upshot of all this is that if you take 2.33 and divide it by 2.33 you get 1.
20 Therefore, the electrical conductivity of the irrigation water would then equal that
21 of the saturated paste and which is not utilized in the guidelines.

22 (November 21, 2005, transcript, 5:2-12.)

23 Third, rather than calculate effective rainfall and how that might affect crop production,
24 Mr. Prichard stated that Mr. Letey simply examined a few scenarios assuming a certain amount
25 of rainfall to be effective, rather than actually "calculat[ing] what the effective rainfall is."

26 (November 21, 2005, transcript, 22:20-21.) As Mr. Prichard stated, Mr. Letey

27 ... has given three different possibilities for effective rainfall out of the total. We
28 don't know which one of those it might be. And also we still don't know whether
during that period of time if there was not some additional amount of that water
used by transpiration for the weeds that existed, and if leaching were possible and
if there were a high watertable, leaching may not have been possible during that
period of time. So to take the view that he accounted for a rainfall and therefore
leaching will occur is not true.

 (November 21, 2005, transcript, 23:2-11.)

1 None of Mr. Prichard's critiques of Mr. Letey were refuted on cross-examination or on
2 rebuttal. From this, the Board should conclude that Mr. Letey's work is an abstract evaluation of
3 conditions that do not exist in the Delta. As Mr. Letey himself stated:

4 Q. BY MR. NOMELLINI: Mr. Letey, based on your testimony, am I correct you
5 are not offering any testimony with regard to the impact of salinity in the water on
6 agricultural operations in the Delta?

6 A. My testimony is generic, not specific to any location.

7 (October 25, 2005, transcript, 167:11-17.)

8 g) SDWA et al. also put on testimony by Dr. Sean Snaith, an economist. Dr.
9 Snaith did an examination of the economic impacts to San Joaquin County crop production and
10 associated impacts (SDWA-6). Dr. Snaith listed and discussed the assumptions in his study,
11 clarifying that the numbers were general, but gave a good overview of economic impacts
12 assuming poorer water quality affects crops production.

13 h) Finally, with regard to this, it should be noted that other proposed
14 testimony by the San Joaquin River Group Authority on why Delta farmers did not need the
15 water quality set forth in the objectives was not presented and was therefore not subject to the
16 light of cross-examination.

17 2. Should the Permit Conditions Always be Enforced?

18 a) DWR also argues that its permit obligations to meet the three interior
19 South Delta standards is conditional, and that the conditions which would require compliance are
20 not present. This novel argument is based upon the language in D-1641 which states:

21 If Licensee/Permittee exceeds the objectives at stations C-6, C-8, or P-12,
22 Licensee/Permittee shall prepare a report for the Executive Director. The
23 Executive Director will evaluate the report and make a recommendation to the
24 SWRCB as to whether enforcement action is appropriate or the noncompliance is
25 the result of actions beyond the control of the Licensee/Permittee.

24 (D-1641 at pg. 160, 161.)

25 DWR interprets this language to mean two things. The first is that enforcement of the
26 subject permit terms can only occur after they have submitted the exceedance report. Second,
27 they argue that the language means they have no obligation to meet the standards if the non-
28 compliance is the result of actions beyond their control.

1 Taking the former first, DWR's position has no merit. If the exceedance report is a
2 precondition to an enforcement action, then DWR (and USBR) can control/prevent any such
3 enforcement action by not submitting the report. This may sound like some abstract argument,
4 but in fact, this very thing has already occurred.

5 In the Division's Case in Chief, it was noted that DWR and USBR violated the 1.0 EC
6 standard at two of the interior South Delta compliance stations in the year 2003, but failed to
7 report it. (October 224, 2005, transcript 47:25 - 48:25.) The report was not filed until October
8 of 2005, after the Division found out about the exceedances. DWR actually maintained that no
9 such enforcement could occur until after this two-year delinquent report had been filed and
10 considered. The protection of water quality is not so constrained.

11 b) DWR's second argument deals with whether any exceedances are outside
12 of its control. This argument also has no merit. First, DWR is alleging a situation that exists
13 nowhere else; in no other permits. Obligations for discharges, releases of water, and other
14 operations are placed on permits after the Board has decided one or more beneficial uses require
15 such actions for protection. No permit issued by the SWRCB or any Regional Board places a
16 condition on a permit that (the permittee must comply with the permit condition) only if a
17 specific action is later determined to cause harm to beneficial uses.

18 In D-1641 (and the 1995 Water Quality Control Plan), the SWRCB determined that the
19 SWP and CVP were responsible for the poor water quality in the San Joaquin River and the
20 South Delta. That determination lead to DWR and USBR being assigned the obligation of
21 meeting the water quality objectives. DWR now argues it is only responsible if it traces a
22 particular water quality exceedance to a particular SWP action. By their reasoning, DWR could
23 argue it need not meet other mandatory fishery releases because in any particular year, a salmon
24 run might be healthy.

25 The water quality objectives are an ongoing obligation, not a sporadic, some time
26 protection of beneficial uses. If DWR need not meet the objective, who then did the SWRCB
27 assign it to when it implemented the 1995 Water Quality Control Plan through D-1641?

28 c) What did the language in D-1641 mean when it referenced "actions

1 beyond the control” of the permittee? The explanation is simple. D-1641 acknowledges that
2 many factors affect Delta water quality: San Joaquin River inflow, tidal action, diversions by
3 SWP and CVP, local water users, agricultural return flows, and channel capacity. (See D-1641
4 at page 86.) The 1995 and 1991 Water Quality Control Plans anticipated that dilution flows
5 were necessary to meet the Vernalis and Brandt Bridge standards, and that other actions would
6 be necessary to help meet the other two standards.

7 Implementation of the objective will be accomplished through the release of
8 adequate flows to the San Joaquin River and control of saline agricultural
9 drainage to the San Joaquin River and its tributaries. Implementation of the
10 agricultural salinity objectives for the two Old River sites shall be phased in so
11 that compliance with the objectives is achieved by December 31, 1997.

12 (1995 Water Quality Control Plan, page 29.)

13 Similarly, the 1991 Water Quality Control Plan (table III-3 on page III-13 and footnote 3
14 thereto on page III-17) indicate a progressive implementation of the water quality standards.
15 Stage one requiring 500 mg/l TDS at Vernalis; stage two requiring the 0.7/1.0 EC at Vernalis
16 and Brandt Bridge, and the final stage requiring the 0.7/1.0 EC standard at all four South Delta
17 stations. Hence, it cannot be seriously argued the DWR and the USBR didn't know that meeting
18 the standards would require additional actions over the years, including more dilution flows on
19 the San Joaquin River.

20 Knowing that things such as evapotranspiration by riverine habitat, evaporation,
21 decreased upstream flows, agricultural return flows, and local municipal effluent discharges all
22 affected water quality in the South Delta, the SWRCB still assigned the obligation to meet the
23 standards in the South Delta to DWR (and the Bureau).

24 d) DWR's assertion regarding controllable factors is incorrect for other
25 reasons. The subject permit conditions bind not just DWR's Banks Pumping Plant, but also its
26 Oroville Project and the San Luis Reservoir (see D-1641, page 155 and table 1, page 4). This
27 means that those facilities' operations are contingent upon meeting the standards in the South
28 Delta. Therefore, Oroville releases may be necessary so that sufficient fresh water is in the Delta
to insure the temporary barriers are working effectively. It does not mean that since the Oroville
Dam does not affect San Joaquin River salinities, DWR has no obligation. Similarly, San Luis

1 Reservoir might need to be operated to assist in their being sufficient dilution flow in the San
2 Joaquin River to meet the three interior Delta standards. It does not mean that if the reservoir is
3 filled in a manner that has no effect on San Joaquin River salinities, DWR has no obligations.
4 Under DWR's reasoning though, the permit conditions on Oroville and San Luis Reservoir and
5 the Banks Pumping Plant are meaningless. Realistically, the permit condition does not state that
6 the standards must be met only by facilities that cause a salinity problem, it states that those
7 facilities may only operate if the standards are met.

8 e) DWR's definition of what is controllable is also incorrect. In addressing a
9 different issue, the SWRCB define what is controllable. The 1991 Water Quality Control Plan,
10 footnote 4 on page III-17 states:

11 Controllable water quality factors are those actions, conditions, or circumstances
12 resulting from human activities that may influence the quality of the waters of the
13 State, that are subject to the authority of the State Board, or the Regional Board,
and that may be reasonably controlled.

14 We see then, that rather than "controllable" being defined as a direct result of a specific
15 current SWP operation, it is defined as the broad range of human activities that affect water
16 quality and which can be regulated. This reaffirms the idea that DWR (and USBR) must meet
17 the standards if those standards are at risk due to the variety of human activities; not only when
18 they are at risk by current specific project operations. To the contrary, the permit conditions
19 require changes to the project operations to cure the results of those various human activities.

20 What is left are catastrophic or other short-term "uncontrollables." Levee breaks on
21 Delta islands cause a rush of inflow bringing salts from the Bay and are uncontrollable until the
22 inflow to the break reaches equilibrium. An accident that impairs the operation of a temporary
23 barrier so that export quality water cannot be trapped would be uncontrollable until fixed.
24 Breaks in aqueducts and canals which would prevent delivery of dilution flows to the San
25 Joaquin River are uncontrollable until repaired. Export pumps may break down and the ability
26 to provide water for dilution flows to the River may be temporarily uncontrollable until the
27 pumps are replaced or repaired. As we can see, even if DWR and USBR are operating to meet
28 the water quality objectives, uncontrollable events not the result of human activities, may

1 interrupt or temporarily prevent them from meeting the objectives. In such an event,
2 enforcement might not be proper, and the language of D-1641 is explained.

3 f) Again, SDWA et al. provided evidence showing that there were
4 controllable factors which DWR and USBR could undertake to meet the subject standards. As
5 set forth in Alex Hildebrand's testimony (SDWA-2), DWR and USBR can take numerous
6 actions to meet these standards. Those actions include additional dilution flows through
7 purchases, exchanges, or transfers; recirculation of San Joaquin River water; coordination of
8 upstream releases; and changes to the temporary barrier project to increase its efficiency
9 (SDWA-2, pages 3-5). The Board should also note that rather than the projects losing any
10 additional supplies they use for additional dilution flows, they could seek to recapture those
11 waters under current or amended permit terms. It is also interesting to note that as referenced
12 herein, DWR has undertaken no activities to determine if these additional actions can be
13 accomplished.

14 3. The SWP Does Affect San Joaquin River Salinity.

15 a) Another fatal flaw in DWR's argument is its assertion that it does not
16 affect San Joaquin water quality and therefore does not affect South Delta water quality at the
17 three interior South Delta compliance locations. Although DWR attempted to show modeling to
18 support this assertion, the modeling simply ignored other facts.²

19 After DWR pleaded innocent to having any effect on South Delta salinity, SDWA et al.
20 offered rebuttal testimony by Alex Hildebrand. In that rebuttal, Mr. Hildebrand identified at
21 least five ways in which the SWP in combination with the CVP affects salts in the San Joaquin
22 River and the South Delta. He explained how the SWP increases the amount of poor quality San
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24 ² DWR's argument was that with temporary barriers in operation, changes in SWP
25 exports (not CVP exports) have no material affect on water quality at the compliance locations.
26 The premise of this position is false. Numerous actions of DWR and USBR affect San Joaquin
27 River flows and salinity, and South Delta water levels, flows and quality. DWR's argument
28 assumes that its temporary barriers (by partially mitigating some of these factors) makes the other
factors irrelevant. Just because temporary barriers dampen the effects of exports on water levels
and reverse flows, the joint operations of the SWP and CVP are still the main cause of the
degradation of water quality in the San Joaquin River and the South Delta.

1 Joaquin River water being drawn to the export pumps and thus affecting drainage quality to the
2 River and Delta. (November 18, 2005, transcript 172:14 - 173:7.)

3 He explained how operation of the SWP assists at some times in bringing additional Bay
4 salts to the export pumps. (November 18, 2005, transcript 171:16 - 172:11.)

5 He explained how the SWP assists the CVP in making its deliveries to areas which drain
6 into the San Joaquin River, which deliveries would be less absent the assistance. (November 18,
7 2005, transcript 175:7 - 17.)

8 He explained how some DWR funding is used for projects that decrease drainage flows
9 and concentrate the salts in the drainage. (November 18, 2005, transcript 177:8 - 178:6.)

10 He explained how the temporary barriers create and move null zones where salts
11 accumulate in the South Delta channels. (November 18, 2005, transcript 179:20 - 178:19.)

12 In addition, the San Joaquin River Exchange Contractors offered other rebuttal evidence
13 showing another way in which the SWP affects San Joaquin River salinities. The Exchange
14 Contractor's witness, Mr. Joe MaGahan, showed how leakage from the California aqueduct
15 increased the head on upslope, subsurface waters which adversely affect the Grasslands' area
16 efforts to limit their drainage into the San Joaquin River, and how that increased subsurface head
17 can affect the subsurface flow of poor quality water directly into the river.

18 None of Mr. Hildebrand or Mr. McGahan's testimony was refuted or contradicted by
19 DWR. Hence, contrary to DWR's assertions, it does adversely affect the San Joaquin River and
20 South Delta quality. Certainly, until DWR mitigate these effects, it cannot claim that South
21 Delta water quality problems are "beyond their control."

22 **III. USBR'S LACK OF PARTICIPATION IN THE PROCESS**

23 As the Board well knows, the USBR did not participate to any meaningful extent in the
24 hearing which proposed to place a Cease and Desist Order on it. The Bureau offered no
25 testimony regarding whether or not violations of the subject standards were likely, whether or
26 not it was undertaking additional actions in order to meet the standards, or whether or not it
27 believed the standards were conditional. Further, the Bureau did not cross-examine any other
28 party's witness to elicit relevant testimony to support whatever position the Bureau might have.

1 Consequently, there appears to be no relevant information or evidence to counter the Division's
2 request for a Cease and Desist Order against the Bureau. Hence, the Board should issue an order
3 with the terms and conditions as recommended below.

4 **IV. WHAT CONDITIONS SHOULD BE CONTAINED**
5 **IN THE CEASE AND DESIST ORDERS?**

6 A. CDO'S issued against DWR and USBR should make no reference to permanent
7 barrier installation. It is not proper for the Board to designate any permit how compliance will
8 be achieved, only that it will be achieved. As we have seen, many different actions can together
9 result in compliance of the subject objectives. The permittee should be given the flexibility to
10 choose how to achieve compliance. Further, conditions referencing permanent barriers would be
11 a clear change in the provisions of D-1641, Table 2, footnote 5, which contains criteria to
12 "unimplement" the subject water quality objectives. Any such change, or the correction of this
13 failure to fully implement a water quality objective, will be accomplished through the Periodic
14 Review process of the 1995 Water Quality Control Plan, and any implementation process
15 thereafter.

16 B. The Conditions of the CDO's Should Contain Certain Language.

17 1. The CDO's should clarify that since April 2005, the three interior South
18 Delta Standards are 0.7/1.0 EC and that DWR and USBR must comply with these provisions.
19 Although it may seem obvious and even repetitive to say a Cease and Desist Order requires
20 compliance, the current Draft Orders can easily be read to defer or excuse such compliance.
21 Consequently, the Orders should make it very clear that compliance with the objective/permit
22 conditions are required.

23 2. The CDO should impose a civil penalty for noncompliance. As SDWA
24 and LAFAYETTE RANCH stated in their Opening Statement, the Board must treat DWR and
25 USBR the same as it treats other parties before it.

26 When the three Term 91 diverters were before the Board claiming they had alternate
27 water rights during times when the application of Term 91 would prevent diversions under their
28 permits, the Board doubled the proposed fines holding that illegal diversions should be more

1 expensive than legal ones. (See WRO 2004-0004, page 31.)

2 Similarly, if DWR continues their upstream dam operations, export pumps, and San Luis
3 storage but do not meet the permit terms of those facilities, they are illegally diverting water.
4 Hence, if the projects wish to continue to divert six million acre-feet of water rather than provide
5 the necessary dilution flows to meet the water quality objectives, they too should be faced with
6 penalties to show them that illegal diversions are more expensive than legal ones. The amount
7 of such fees should be based upon the actual contract costs of the SWP and CVP for delivering
8 water to a point of which the water could be released to the San Joaquin River as dilution flow.

9 **V. CONCLUSION REGARDING PROPOSED CDO'S**

10 Based on the above, it is likely that DWR and USBR will continue their current
11 operations which are only geared at meeting a 1.0 EC standard all year at the three interior South
12 Delta compliance locations. It is also clear from the evidence presented at the hearing that
13 damage to agricultural crops will result at salinities above the current standard of 0.7 EC (April
14 through August). Hence, CDO's should issue for the Bureau and DWR containing the terms and
15 conditions suggested above.

16 **VI. WATER QUALITY RESPONSE PLAN**

17 The hearing also examined the issue of whether or not the Water Quality Response Plan
18 adopted by the Chief of the Division of Water Rights should be amended or rescinded. In the
19 adopted plan, the Division Chief approved JPOD operations (in a nonpublic procedure) even
20 when DWR and USBR were not meeting their water quality obligations for the three interior
21 South Delta standards. Such a "waiver" of existing water quality objectives and permit
22 conditions is not only inappropriate, but is contrary to the express language of D-1641 (see D-
23 1641 page 159).

24 Limited testimony was presented on this topic. Specifically, DWR presented opinions by
25 John Leahigh that DWR's failure to meet the standards could result in adverse impacts to its
26 delivery of water to contractors including environmental uses. (DWR-24.) In addition, SDWA
27 et al. included testimony by Alex Hildebrand which indicated that the standards should be
28 enforced and that the projects should not reap the benefits of additional exports when they do not

1 **PROOF OF SERVICE BY E-MAIL AND MAIL**

2 I declare as follows:

3 I am over eighteen years or age and not a party to the within entitled action. My business
4 address is the Law Office of John Herrick, 4255 Pacific Avenue, Suite 2, Stockton, California,
5 95207. I am employed in San Joaquin County, California. Based on an agreement of the parties
6 to accept service by e-mail or electronic transmission, on December 12, 2005, at approximately
7 2:00 p.m., I caused the SOUTH DELTA AND LAFAYETTE RANCH'S CLOSING BRIEF to be
8 sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable
9 time after the transmission, any electronic message or other indication that the transmission was
10 unsuccessful.

11 Jmccue@waterboards.ca.gov	Jean McCue
12 crothers@water.ca.gov	Cathy Crothers
13 jstruebing@mp.usbr.gov	Amy L. Aufdemberge
14 emahaney@waterboards.ca.gov	Erin K. L. Mahaney
15 ngmplcs@pacbell.net	Dante John Nomellini
16 cpanelson@prodigy.net	Carl P. A. Nelson
17 klanouette@olaughlinparis.com	Tim O'Laughlin
18 tshephard@neumiller.com	Thomas J. Shephard, Sr.
19 JRubin@KMTG.com	Jon D. Rubin
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23 pminasian@minasianlaw.com	Paul Minasian
24 msexton@minasianlaw.com	Michael Sexton
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26 kharrigfeld@herumcrabtree.com	Karna Harrigfeld
27 jzolezzi@herumcrabtree.com	Jeanne Zolezzi
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tcannon@dfg.ca.gov	Tina R. Cannon
WrHearing@waterboards.ca.gov	SWRCB

22 I am readily familiar with the practice of the Law Office of John Herrick for collection
23 and processing of correspondence for mailing with the United States Postal Service. In the
24 ordinary course of business of the Law Office of John Herrick, correspondence is deposited with
25 the United States Postal Service the same day as it is collected and processed. On December 12,
26 2005, I served SOUTH DELTA WATER AGENCY AND LAFAYETTE RANCH'S CLOSING
27 BRIEF on the following individuals by placing a true copy thereof enclosed in a sealed envelope
28 with postage thereon fully prepaid, and placed for collection and mailing on said date to be

1 deposited with the United States Postal Service following ordinary business practices at Stockton,
2 California, addressed as follows:

3 Gary Bobker, Program Director
4 The Bay Institute
5 500 Palm Drive, Suite 200
6 Novato, CA 94949

7 Patrick Porgans
8 Patrick Porgans & Assoc., Inc.
9 P. O. Box 60940
10 Sacramento, CA 95860

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct.

13 EXECUTED on December 12, 2005, at Stockton, California.

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/S/ _____
Dayle Daniels

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PROOF OF PERSONAL SERVICE

STATE OF CALIFORNIA)
County of San Joaquin) ss.

I am a citizen of the United States and a resident of the County of San Joaquin. My business name is Service First and my business address is Post Office Box 2257, Stockton, California, 95202. I am over the age of eighteen years and not a party to the within entitled action.

On December 12, 2005, I hand delivered the original and five copies of SOUTH DELTA WATER AGENCY AND LAFAYETTE RANCH'S CLOSING BRIEF to the State Water Resources Control Board by hand delivering true copies thereof to the person at the front desk of the SWRCB for delivery on the SWRCB at approximately 2:30 p.m.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on December 12, 2005, at Stockton, California.

/S/ _____
Patrick Burnett